PUBLIC PROSECUTOR

v.

CHEE KON FATT

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 47 (58) - 14 - 86]
13 AUGUST 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Whether box containing drugs was on the motor cycle when the accused was seated astride on it - Credibility of witness - Corroboration - Effect of repetition of former statements - Animus - Failure of prosecution to call essential witnesses - Best evidence - Possession and control - Presumptions - Dangerous Drugs Act 1952, ss. 37(d), (da) - Evidence Act 1950, ss. 73A(7), 114(g).*

EVIDENCE: *Uncorroborated testimony of complainant - Not mentioned in police report - Whether motive for falsely implicating accused - Failure of prosecution to call witness present at scene although made available to defence - Essential to the unfolding of the narrative - Best evidence - Burden on prosecution - Beyond reasonable doubt - Evidence Act 1950, s. 73A(7), 114(g).*

The accused was charged with trafficking in dangerous drugs under s. 39(B) of the Dangerous Drugs Act 1952 (the Act). The crucial factor in this case was whether the prosecution had proven its case. The prosecution only produced the uncorroborated evidence of the complainant C, a police constable, who said that he had seen the box containing drugs on the petrol tank of the motorcycle on which the accused was seated. However, this fact was not stated in the complainant's police report.

Other important points for consideration were whether C had any motive to falsely implicate the accused, the failure of the prosecution to call the sister S of the accused who was present at the scene of the arrest and who was seen conversing with the accused; S was however made available to the defence.

Held:

[1] There was no corroboration of the evidence of the arresting constable as to the presence of the box on the accused's motorcycle C did not even mention this in his police report. Nor was any explanation given in Court for this glaring omission. Repetition of the facts as detailed to his superior officer was not corroboration under s. 73A(7) of the Evidence Act 1950.

[2] In addition, the position of the accused seated astride on his stationary motorcycle would have caused C to assume that the accused was either about to enter or leave the house from which C had directed to keep a watch on. Therefore, C might have picked on the accused even if there had not been a box on the petrol tank. As the accused had caused injuries to C in the ensuing arrest, there was good reason for C having an *animus* against the accused.

[3] No presumption adverse to the prosecution may be made under s. 114(g) of the Evidence Act 1950 because the prosecution did not make S available to the defence.

[4] There is no doubt that S could have shed much light on the case had she called and might have even filled in gaps in the prosecution case to the history of the box. Her evidence could scarcely be considered unnecessary. Also, there was no evidence that she was obviously

hostile to the prosecution even though she was the sister of the accused. Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must be called by the prosecution whether in the result the effect of their testimony is for or against the prosecution.

[5] Furthermore, the box in which the drugs had been found had not been examined for fingerprints. In a criminal case the Court is entitled to the best evidence.

[Prosecution failed to discharge burden of proof; accused acquitted and discharged.]

Cases referred to:
R v. Baskerville [1916] 2 KB 658 ***(cit)***
Teh Lee Tong v. Rex [1956] MLJ 194 ***(cit)***
R v. Hall [1986] 1 Qd. R. 462 ***(cit)***
Seneviratne v. R. [1936] 3 All ER 36 ***(foll)***
Abdullah Zawawi v. PP [1985] CLJ (Rep) 19 ***(cons)***
Public Prosecution v. Saimin & Ors. [1971] 2 MLJ 16 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B
Evidence Act 1950, ss. 73A(7), 114illus.(g)

Other source referred to:
Corroboration by Former Statements, [1990] 3 MLJ xci by Mr. Augustine Paul

For the accused - Karpal Singh; M/s. Karpal Singh & Co.
For the public prosecutor - Kok Keng Fai, DPP

JUDGMENT

Edgar Joseph Jr J:

In this prosecution for trafficking in a dangerous drug, to wit, heroin, in contravention of s. 39B of the Dangerous Drugs Act 1952 (the Act), the whole of the material evidence had been closely and critically examined before me with great care and it is unnecessary to discuss it at any length again.

Clearly, the result of the case depended upon my assessment of the credibility of the complainant detective corporal Chettavelu on the one hand, and the accused, on the other.

More particularly, the crucial factor in the case was whether it was proved by the prosecution that when the accused was seated astride the motorcycle concerned, the cardboard box containing the 40 packets of heroin weighing 15,668.7 grams, the subject of the charge, was indeed resting on the petrol tank of the motorcycle.

The only evidence in the case for the prosecution as to this alleged fact was the uncorroborated testimony of Chettavelu and, although it was said that he did give his version of the facts as deposed to in this Court, to his superior Chief Inspector Suleiman and to the investigating officer DSP Yeap Hooi Pin, within a short while after the arrest of the accused, nowhere in his police report made in writing on that day at 8.15 p.m. did he even mention the fact that he had seen the box on the petrol tank of the motorcycle seated astride which was the accused nor was any explanation vouchsafed to this Court for this glaring omission. In any event, repetition is not corroboration in the true sense within the meaning of *R v. Baskerville* [1916] 2 KB 658.

This proposition has received statutory recognition in s. 73A(7) Evidence Act (Revised - 1974) which has been the subject of an illuminating article entitled "*Corroboration by Former Statements*" [1990] 3 MLJ xci by Mr. Augustine Paul, Senior Sessions Judge, Georgetown.

Secondly, an important point which called for consideration was whether Chettavelu had any motive for wanting to falsely implicate the accused on the charge of trafficking in a dangerous drug bearing in mind that the accused was a total stranger to him.

Now, Chettavelu had himself testified that at the time he had attempted to apprehend the accused the latter had fisted him on the face and also struck him with a crash helmet as a result of which he had sustained injuries to his nose and lips which required medical attention. Such being the case, there was good reason for him having an *animus* against the accused.

Thirdly, I asked myself, why should Chettavelu in the first place have approached the accused with a view to stopping him if there was no box on the petrol tank of the motorcycle? It will be recalled that Chettavelu had himself testified that he had been directed by Chief Inspector Suleiman to proceed to dwelling house no. 96 Medan Lim Cheng Teik and to detain anyone who went into or came out of that house. So when Chettavelu saw the accused seated astride his stationary motorcycle directly in front of that house it was but natural for Chettavelu to assume that he had just left or was about to enter the house and this would explain why Chettavelu might have picked on him even if there was no box on the petrol tank.

Fourthly, was it necessary for the prosecution to have called the sister of the accused Chee Swee Phang who was seen by Chettavelu to have been conversing with the accused in front of dwelling house 96 just before the arrest of the accused and who, according to Chettavelu, had picked up the box from the petrol tank and had thrown it in front of a dwelling house next door being no. 94, while Chettavelu was engaged in a struggle with the accused?

Before I deal with this question, I should perhaps straightaway say that no presumption adverse to the prosecution may be drawn under s. 114(g) of the Evidence Act because the prosecution did make Chee Swee Phang available to the defence but the defence did not call her.

Now, to come to the question posed, it is settled law that having brought to Court witnesses from whom statements have been taken the prosecution is not bound to call or to offer for cross-examination a witness whose testimony is in its opinion unnecessary or obviously hostile. (See *Teh Lee Tong v. Rex* [1956] MLJ 194). In the present case, Chee Swee Phang was actually present at the scene and was conversing with the accused at the material time. Indeed, according to Chettavelu she had actually attempted to dispose of the box and its contents. There is no doubt that she could have shed much light on the case had she been called and might have even filled in gaps in the prosecution case as to the history of the box. Indeed she was arrested by Chettavelu along with the accused on the ground of trafficking in the same drug but was subsequently released. So, her evidence could scarcely be considered unnecessary. Also, there was no evidence that she was obviously hostile to the prosecution even though she was the sister of the accused. As the Court pointed out in *R v. Hall* [1986] 1 Qd R 462 the prosecution often does not know that a witness is hostile until the witness has given evidence.

I am thus reminded of the words of Lord Roche when delivering the advice of the Privy Council in an appeal from Ceylon (now Sri Lanka) in *Seneviratne v. R.* [1936] 3 ALL ER 36, 49:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must, of course, be called by the prosecution **whether in the result the effect of their testimony is for or against the prosecution.** (Emphasis is mine)

And, of less pertinence, is what Salleh Abbas, LP said in *Abdullah Zawawi v. PP* [1985] CLJ (Rep) 19:

> The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s. 114(g) of the Evidence Act. But where the prosecution evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

Fifthly, although it was the case for the prosecution that the box had been evidently in the physical possession of the accused no evidence was led as to whether it had been subject to examination for fingerprints. In a criminal case the Court is entitled to the best evidence.

Sixthly, it was urged by defence Counsel that it would have been impracticable for the accused to have ridden his motorcycle with the box and its contents weighing 15,668.7 grams, and the plastic bag, on the petrol tank, as this would have hindered maneuverability. Having inspected the motorcycle with the box and the plastic bag on the petrol tank, on the invitation of defence Counsel, in the presence of the accused, the Deputy Public Prosecutor and defence Counsel, I formed the impression that it was possible, though highly inconvenient, and perhaps even dangerous, to ride the motorcycle under such circumstances as one would be liable to lose control, especially if proceeding at high speed when negotiating sharp corners. It was, therefore, improbable that a carrier of the drug concerned would dare run the risk of using such a means of transport unless obliged to do so. I do not, however, place undue stress on this point and I only mention it in passing.

Turning to the defence of the accused, he denied that he had anything to do with the box; in particular, he denied that the box was on the petrol tank of his motorcycle. He claimed that the box was recovered from under a car parked nearby at the scene by one Syed Baharuddin (brought to Court by the defence, identified but not called), then a police constable attached to the Pulau Tikus Police Station, who handed it to Chettavelu. A mass of hearsay evidence was adduced by the defence in an attempt to show that Syed Baharuddin had made out of Court admissions of the part he allegedly played in relation to the box but I totally disregard it as being wholly inadmissible.

The version of the accused as to the alleged role of Syed Baharuddin (once before prosecuted for trafficking in heroin, but acquitted) may or may not be a concocted tale but, even if so, the burden still rested on the prosecution to prove beyond reasonable doubt that the accused was in possession or control of the box and only then would the presumptions under s. 37(d) and (da) of the Act with regard to the heroin in it arise.

As Sharma J said in *Public Prosecution v. Saimin & Ors.* [1971] 2 MLJ 16, 17,

> The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

I was not concerned with suspicion however grave or theories however ingenious.

In all the circumstances, I was not satisfied that the burden of proof aforesaid had been discharged by the prosecution.

The result was that I found the accused not guilty and recorded an order of acquittal and discharge.

Also found at [1991] 3 CLJ 2564